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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA, and
NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL L. BEATTY
REBECCA H. NOECKER
COLORADO INTERSTATE GAS COMPANY
Post Office Box 1087
Colorado Springs, CO 80944

WILLIAM C. MCCLEARN
JOSEPH W. HALPERN
ELIZABETH A. PHELAN
HOLLAND & HART
Post Office Box 8749
Denver, CO 80201

MARILYN S. KITE
HOLLAND & HART
2020 Carey Avenue
Suite 500
Cheyenne, WY 82001

REX LEE *
CARTER G. PHILLIPS
MARK E. HADDAD
RICHARD D. KLINGLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

J. KENT RUTLEDGE
LATHROP, RUTLEDGE & BOLEY
Post Office Box 4068
Cheyenne, WY 82003

Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF OF PETITIONER

The jury and the district court in this case found that respondents' "reprehensible conduct" caused petitioner actual damages of well over $200 million.[1] After two

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[1] Respondents assert (Opp. 5) that "it was clear" that they were not "found by the jury . . . to have monopoly power—the ability to exclude competition and raise prices." This is completely false. The jury was specifically instructed that to find that respondents violated Section 2 of the Sherman Act the jury had to find that "a firm must possess market strength—market strength that approaches monopoly power; that is, the ability to control prices and exclude competition." Jury Instr. No. 33 (Doc. 574).

Respondents also assert (Opp. 5) that "there was no proof of supracompetitive prices for transportation on the [Trailblazer] 'System'." This is equally untrue. It was undisputed that transportation costs on Trailblazer "substantially exceeded" those on

rounds of review in the court of appeals, respondents are on the verge of avoiding having to pay all but a mere $8 million of the amount found by the triers of fact to be appropriate damages for NGPL's misconduct. The original ruling overturning the antitrust award was contrary to law, but the later ruling removing $15 million from the tort "verdict," which had been affirmed, was not only contrary to law but also nothing short of astonishing.

But the Court can and should correct the far-reaching errors that threaten to insulate respondents from having to compensate petitioner fairly. Both errors are properly before the Court and both can be corrected readily. With respect to the $23 million tort verdict, the Court can summarily undo the injury the Tenth Circuit has done to the operation of Rules 49 and 60(b) and the "scope of the mandate" doctrine. Respondents offer no serious defense of that ruling, preferring instead to rely upon a patent misreading of the decision. But if petitioner is correct about the holding, which undermines the efficient process of handling multiple claims litigation, then it clearly warrants review; certainly, respondents have offered no argument to the contrary.

With respect to the antitrust judgment, the Court should simply hold the petition until it decides *Spectrum Sports, Inc.* v. *McQuillan*, No. 91-10, and then remand the case to the court of appeals to reexamine the issue in light of whatever standards the Court adopts. Because the Tenth Circuit overturned petitioner's verdict based on an extreme and unjustifiably harsh rule, fairness dictates that petitioner should receive the benefit of whatever new rule is adopted by this Court. Petitioner will reply to respondents on each of these points in turn.

1. On the question of the demand charge damages in the tort claim, respondents' entire argument is that the Tenth Circuit's decision neither adopts unprecedented rules to interpret appellate mandates nor limits recovery

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CIG's pipeline. 661 F. Supp. 1448, 1461 (D. Wyo. 1987); T. 1569, 1571-78, 1584-85, 4768-69, 6964-65, 7728; PX 483, 499, 500, 1333.

allowed upon claims affirmed on appeal. Respondents do not dispute that the issue as presented is an important one with wide-ranging effects. Instead, they claim that the Tenth Circuit's decision simply addressed the timing of a required request for full recovery on the tort verdict. Opp. 15. That characterization of the decision, offered without any reference to the text of the opinion, in fact underscores all the claims presented in the petition.

Nothing in respondents' argument establishes that the Tenth Circuit's decision has any less broad or detrimental effect than that described in the petition. The error of the Tenth Circuit's decision, and the source of the broad harm it will cause to multiclaim litigation, is that it transforms affirmance of a verdict on a claim into a determination affecting and limiting the scope of recovery. The Tenth Circuit held that its earlier affirmance of the tort claim in fact barred full recovery on the claim because a portion of the damages had been allocated to a related claim reversed on appeal. Pet. App. 8a-11a; Pet. 10-11. Respondents' procedural characterization points to an additional error of the Tenth Circuit decision, but one that exists *only* because the opinion also adopted a novel, broad rule: Respondents fault petitioner for not rearguing on the initial appeal or seeking rehearing regarding the scope of damages supported by the tort claim, but that reargument is in the usual case—and in every circuit other than the Tenth Circuit—entirely unnecessary. CIG was obliged to have argued that the tort verdict supported the full $23 million damages found by the jury only if the Tenth Circuit's rule disallows recovery in multiple claim cases in precisely the manner outlined in the petition. Pet. 15-17. Thus, NGPL's argument is completely circular.

There is also no merit to respondents' suggestion that this case is limited to the issue of "allow[ing] the plaintiff to make such a request [for full recovery of damages] for the first time in the district court" on remand. Opp. 15. Consistent with the practice of every circuit except, now, the Tenth Circuit, CIG preserved its claim and assumed, along with the district court in both the initial

and remand proceedings, that a verdict affirmed on appeal allows full recovery of damages as found by the jury. Pet. 7-11. The Tenth Circuit rule is to the contrary and requires review or summary reversal.

The suggestion that CIG failed to act in timely fashion simply cannot be squared with the procedural history of the case. As respondents acknowledge, "CIG asked the district court to eliminate the duplication by 'subtract-[ing] . . . the demand charge payments from the tortious interference award.'" Opp. 3-4 (citation omitted). NGPL obviously did not object to that action.

Respondents assert (Opp. 8) that the propriety of awarding demand charge damages was not at issue in the first appeal. This is false. On the first appeal, NGPL acknowledged that the tort judgment included demand charge damages when it argued that those damages could not be recovered. The section of NGPL's brief entitled "The Tort Damages Do Not Flow From The Tort Claim Presented" expressly challenged that part of the tortious interference judgment awarding future Canyon Creek and Overthrust demand charges. Specifically, NGPL argued that "[t]he district court also erred in awarding future *tort damages* for the allegedly useless rights of CIG in Canyon Creek and Overthrust." NGPL's First Appeal Br. 46 n.37 (emphasis added). Thus, the validity of those damages in the tort verdict was directly challenged in the appeal by NGPL.

In the face of NGPL's argument, the Tenth Circuit held that "[t]he *verdict* for tortious interference with contract is affirmed." Pet. App. 41a. The plain meaning of that language is that the demand charge damages, which were awarded to CIG by the jury in the verdict and were challenged by respondents in the first appeal, were affirmed on appeal.[2]

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[2] Of course, even had NGPL not challenged the extent of tort damage recovery, the scope of the mandate doctrine followed in all circuits except the Tenth Circuit would still have provided for full recovery as reaffirmed by the district court on remand. *See* Pet. 20-23.

Against this background it is amazing that respondents urge that CIG should have followed a different course in order to preserve the $23 million awarded by the jury. Certainly, CIG would not have cross-appealed the district court's decision to delete the item of damages to avoid "duplication." Similarly, after the Tenth Circuit affirmed the jury's verdict—not the district court's judgment—and then ordered the district court to act consistent with the Tenth Circuit's opinion, it would have been astonishing if CIG had sought rehearing. What was to rehear? CIG's jury verdict was affirmed in the face of a direct challenge by NGPL to the demand charge damages having been included in the tort verdict.

While respondents say that the various errors identified in the petition are not actually presented, the claim is hollow. To be sure, the Tenth Circuit made no attempt to explain how its result could be squared with Fed. R. Civ. P. 49(a), the scope of the mandate doctrine or Rule 60(b)(5) (all of which points were pressed before the court of appeals). But that does not detract from the conclusion that, if the court of appeals had respected those rules, it would have affirmed the award of the full $23 million in damages for the tort claim.

Because the Tenth Circuit's holding in this regard conflicts with decisions of at least three other circuits (see Pet. 16-18) that would have preserved petitioner's full tort judgment in this case, further review by this Court is warranted. Because the holding below is completely without rational justification, the Court should reverse it summarily to protect the integrity of the process of fairly and efficiently litigating multiple claims in federal courts.

2. NGPL argues that review of the antitrust determination is barred even though related issues in the case are concededly reviewable, and that the petition should be denied even though this Court is preparing to hear argument in a case that will almost certainly require remand of this case to the Tenth Circuit. Both of NGPL's arguments are without merit.

a. First, the antitrust issue is inextricably linked to and reviewable to the same extent as the tort determination, which even NGPL concedes this Court may review. Both claims rest upon the same conduct of NGPL, and an antitrust ruling favorable to CIG would resolve its claim that the tort award is insufficient. Contrary to NGPL's argument regarding this basis for review, Opp. 13, the Tenth Circuit adequately and expressly passed upon the antitrust claim in the initial appeal. Whether the Tenth Circuit restated that determination in the subsequent appeal does not affect reviewability, because the doctrine of law of the case (which barred reargument of the antitrust issue) does not limit this Court's review.[3]

Second, even if the tort and antitrust claims were distinct, the undisputed reviewability of the tort determination empowers this Court to consider all other issues embodied in the case, including the antitrust issue. This Court's grant of jurisdiction extends to cases, not claims, and for this reason, among others, this Court has repeatedly held that a writ of certiorari brings the entire case before the Court and allows review of all issues contained in the record. See Pet. 12 n.6 (collecting cases); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955) (rejecting as "without substance" an argument equivalent to NGPL's, because "[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation"). Indeed, this Court long ago rejected the precise argument that NGPL now repeats:

> It is contended that this question is settled . . . by the decision of the Circuit Court of Appeals on the first appeal and our refusal to review that decision upon complainant's petition for a writ of certiorari, and

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[3] *See, e.g., Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.); *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897); *cf. Urie* v. *Thompson*, 337 U.S. 163, 171 (1949) ("it was not necessary for him to relitigate that claim [in a second appeal] . . . in order to preserve it for our consideration. . .").

> that the only questions open for review at this time are those that were before the Court of Appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari . . . .

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

Third, the interlocutory nature of the Tenth Circuit's initial tort determination also ensures that this Court may review other claims in this case—including the antitrust issue. If CIG had suspected that the Tenth Circuit's initial decision limited the tort award to $8 million and immediately petitioned this Court for review, the obvious and correct rejoinder would have been that review was premature: Further proceedings on remand would determine the scope of the tort award. The parties and the district court understood that the initial decision did not finally fix the tort award at $8 million, as reflected in subsequent litigation.[4] NGPL's current assertion that the initial appellate decision did just that and was in this way final, Opp. 10-11, ignores the basis and need for the litigation which followed and proves too much: if accurate, it would support the clearly incorrect conclusion (which NGPL does not advance) that even the tort determination is now unreviewable. Indeed, contrary to NGPL's separate limitation that the initial appellate decision must contemplate further "substantive" proceedings, this Court has repeatedly reviewed issues resolved by initial appel-

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[4] CIG and the district court believed that the initial appellate decision had provided the basis for a $23 million tort award, and NGPL attacked both that claim and the award of *any* tort damages, arguing expressly that there was no final judgment on this issue. *See* Motion of Natural Gas Pipeline Company of America and NGPL-Trailblazer, Inc., for Judgment and for an Order Releasing Appellate Security from Escrow, dated Feb. 16, 1992, at 6 ("The present case is clearly *sub judice* and still pending before this Court").

late determinations that were far more conclusive than was the Tenth Circuit's in this case.[5]

In sum, there is absolutely no obstacle to this Court's consideration of the antitrust claim. Indeed, respondents' effort to avoid review on this hyper-technical ground reveals plainly the merit of petitioner's argument.

b. On the merits, there is no doubt that it is appropriate for the Court to hold this petition pending the disposition of *Spectrum Sports, Inc.* v. *McQuillan*, No. 91-10. Respondents' argument to the contrary is frivolous. It cannot be seriously argued that whatever standards this Court announces for proving a Section 2 violation will be irrelevant to this case. For example, had this case arisen in the Ninth Circuit, petitioner would have prevailed because it proved specific intent and anticompetitive conduct, which is all that is required to recover under *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), and its progeny.

Indeed, even if the Court adopts a higher standard of proof than *Lessig* required, it is still likely that the holding of the Tenth Circuit, which requires proof of a specific market share even when there is evidence of the exercise

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[5] *See, e.g., Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 671-74 & n.19 (1979) (initial appeal resolved issue reviewed by Court, with district court left only with "enforcement jurisdiction"); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (review of antitrust claim conclusively resolved in initial appeal affirming default judgment, with no subsequent proceedings contemplated); *Barclay* v. *Florida*, 463 U.S. 939, 945-46 (1983); *cf. Urie* v. *Thompson*, 337 U.S. at 171-72 (initial appeal definitively resolved claim); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916) (same). *Washington State Commercial Passenger Fishing Vessel Ass'n* also establishes that a district court's "continuing enforcement jurisdiction" is sufficient to render the preceding appellate decision interlocutory, and that this Court's determination regarding an initial appeal's finality is "discretionary." 443 U.S. at 672 n.19.

of actual monopoly power, would require reconsideration in light of this Court's holding.

Respondents assert (Opp. 14) that *Spectrum Sports* cannot affect the outcome of this case because the Tenth Circuit held that NGPL could not achieve monopoly status. But that holding is based upon the Tenth Circuit's extreme view that proof of a market share in excess of 70 percent is required under Section 2 of the Sherman Act. Pet. App. 34a-36a & n.18.[6] But if this Court holds either that no particular showing of market share is required or that evidence of market power can be sufficient to support a finding of attempted monopolization, then the predicate for the court of appeals' conclusion about impossibility will be undermined. In that event, the antitrust claim will require reconsideration in light of the new standard adopted by this Court in *Spectrum Sports*.

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[6] Respondents suggest (Opp. 14) that the Ninth Circuit has adopted an "impossibility" exception to the rule in *Lessig*. Although, as explained in text, impossibility only begs the question of what market share showing is required to prove a Section 2 claim, the case cited by respondents in fact does not support the exception in any event. The Ninth Circuit in *Rickards* v. *Canine Eye Registration Foundation, Inc.*, 783 F.2d 1329 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986), held that where there is no proof of market dominance the proof of anticompetitive acts must be " 'of a kind clearly threatening to competition or clearly exclusionary.' " *Id.* at 1335 (citation omitted). In that case there had been one sham lawsuit filed, which the Court held was not sufficient to threaten competition. Here NGPL's pattern of "reprehensible" conduct allowed it to control prices and exclude competition. Thus, under *Rickards*, the jury's verdict clearly would be upheld.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL L. BEATTY
REBECCA H. NOECKER
COLORADO INTERSTATE GAS COMPANY
Post Office Box 1087
Colorado Springs, CO 80944

WILLIAM C. MCCLEARN
JOSEPH W. HALPERN
ELIZABETH A. PHELAN
HOLLAND & HART
Post Office Box 8749
Denver, CO 80201

MARILYN S. KITE
HOLLAND & HART
2020 Carey Avenue
Suite 500
Cheyenne, WY 82001

REX LEE *
CARTER G. PHILLIPS
MARK E. HADDAD
RICHARD D. KLINGLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

J. KENT RUTLEDGE
LATHROP, RUTLEDGE & BOLEY
Post Office Box 4068
Cheyenne, WY 82003

Counsel for Petitioner

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* Counsel of Record